UNCONSTITUTIONAL LAWS AND THE FEDERAL JUDICIAL POWER.

The right of the Supreme Court of the United States to declare void an Act of Congress because of its unconstitutionality, is today viewed as a doctrine evolved by the judges themselves. Its origin is traced to the opinion of Chief Justice Marshall in *Marbury* v. *Madison.*[1]

This view meets with no challenge, and is fast becoming a conviction of the popular mind. A magazine like Pearson's assumes to designate the power in question, "The Usurped Power of the Courts," and to write a series of articles thereon. A work on "The Origin and Growth of the American Constitution," by Dr. Hannis Taylor thus speaks *ex cathedra:*

"The right of a court to annul the act of a State, when in its judgment the limitations thus imposed have been exceeded, is purely an American invention, specially distinctive of our system of jurisprudence. That invention, originating in the State institutions, was lifted into a higher sphere upon the creation of the Supreme Court of the United States, the first in history to claim or assert the right to pass upon the validity of a national law. The marvel is that neither in the State nor Federal constitutions was this novel and far-reaching right bestowed by express constitutional grant; in both systems it emerged as a rule of judge-made law." [2]

It is the purpose of this essay to show that these views are wholly and fundamentally untrue; that, on the contrary, the power to declare State laws and acts of Congress alike void for unconstitutionality, was by the framers of the Constitution expressly given in that instrument to the Federal courts; that the language used by them was so interpreted by the members of the Federal Constitutional Convention, and that, too, unanimously; that in the State conventions which met to ratify the Constitution, the same interpretation was unanimously stated or implied; and that in no writing of any of the framers of the Constitution was any contrary interpretation suggested, discussed or advanced.

[1] 1 Cranch. 137 (1803).

[2] Chapter X, p. 331.

The question is not one to be determined by a collation of opinions or by assertion; it is an historical question, capable of complete solution by any serious effort at historical inquiry.

The great controversy at the time of the formation of the Constitution was between those who wished a strong central government and those who wished to keep the States all-powerful. The *theory* underlying the Constitution is that in *the people* resided the ultimate power, and that parts of that power hitherto vested in the several State governments should be delegated to the Federal Government. One party fought for magnified national effectiveness, the other for the retention of State supremacy. In the provisions of the Constitution these two parties compromised and united. But there was one fundamental problem. It was all very well to say to the States: Thus far shall you go and no farther; and to the Federal Government: You must act only within your delegated powers. Who was to judge of the constitutionality of a Federal law or a State law—above all, a State law—said to violate the Constitution? There had been a union under the Articles of Confederation. Congress had made treaties which, under its provisions, purported to bind the States. What did the States do? They passed laws violating the treaties. *What could be done about it?* Nothing.

"We became contemptible," exclaimed Governor Randolph, of Virginia, "in the eyes of foreign nations; they discarded us as little wanton bees, who had played for liberty, but had no sufficient solidity or wisdom to secure it on a permanent basis, and were, therefore, unworthy of their regard. It was found that Congress could not even enforce the observance of treaties. That treaty under which we enjoy our present tranquillity was disregarded."[8]

Wrote Washington to Jay, in 1786:

"If you tell the legislatures they have violated the treaty of peace, and invaded the prerogatives of the confederacy, they will laugh in your face. What then is to be done? . . . I am told that even respectable characters speak of a monarchical form of government without horror. From thinking proceeds speaking; thence to acting is often but a single step. But how irrevocable

[8] Elliott's Debates, Second Edition, Vol. III, p. 27.

and tremendous! . . . What a triumph for the advocates of despotism to find, that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious! Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend!" [4]

The meeting of the Federal Convention in 1787, over which Washington presided, was the measure taken. And the great question it had to settle was: How shall we so adjust matters that State and Federal laws shall both be kept within the limits set by the Constitution? First came Governor Randolph, and by the series of resolutions known as the Virginia Plan, proposed to give to Congress the right "to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of union." On the very day the granting of this power was refused, the following substitute, offered by Luther Martin, was adopted:

"That the legislative acts of the United States made by virtue and in pursuance of the articles of union, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants—and that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding." [5]

Luther Martin violently opposed the adoption of the Constitution, and, when afterwards charged with inconsistency in having framed this clause, pointed out that he had done so as a preferable alternative to putting the power into the hands of Congress.[6] Some power there must be to determine whether Congress encroached upon State legislative activities, and whether the States assumed to themselves strictly Federal functions. Was this power to lie with Congress? No, said the convention after a bitter fight. Was it to lie with the States? The existing ensample of the weakness of the confederation made such a proposition so palpably inconsistent with an effective union, that the conven-

[4] Washington's Writings, Jared Sparks, Vol. IX, pp. 188-9.

[5] Records of the Federal Convention, Farrand, Vol. II, pp. 28-9.

[6] In public letter to Maryland Journal, Farrand, Vol. III, pp. 236-7.

tion did not even consider such an alternative. Hence it was that Calhoun and the States rights advocates of after years came to argue that the absence in the convention of any express rejection of this view amounted to its implied adoption. But the possibility of that interpretation ended with the Civil War.

This was the fundamentally vital problem confronting the people of the United States and the constitutional convention: With the States on one side, and the Federal nation on the other, who should keep them both within the limits set by the Constitution? Luther Martin suggested: The Judiciary. Straightway the convention accepted the novel idea. And they did it unanimously. Thus the language of the resolution of Luther Martin somewhat modified became part of Article VI of the Constitution.

Governor Randolph's resolution giving to Congress the power of vetoing State legislation has already been quoted. When it was introduced, the report of the proceedings in convention says:

"Mr. Sherman thought it unnecessary, as the Courts of the States would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived." [7] . . .

"Mr. Gov. Morris was more and more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the judiciary department." [8]

In the face of these utterances accompanying the unanimous adoption of Luther Martin's resolution, in the face of the positive and emphatic language of the resolution, it must be clear to any open mind that the judicial power to declare void a legislative act was both explicitly and implicitly recognized. It is true that the legislative acts at that moment in contemplation were State acts, and that the language of the resolution applied as well to State judges as to Federal. Indeed, Luther Martin afterwards pointed out that the Federal inferior judiciary were not provided for when he introduced his resolution, and he stated that "it was my wish and hope that every question of that kind

[7] Farrand, Vol. II, p. 27.
[8] Farrand, Vol. II, p. 28.

would have to be determined in the courts of the respective States."[9] But the fact remains that the *judiciary*—whether State or Federal is for the moment immaterial—were expressly directed to set aside a legislative act of a State if contrary to the Federal Constitution. "The judges in every State shall be bound [by this Constitution and the laws of the United States which shall be made in pursuance thereof], anything in the Constitution or laws of any State to the contrary notwithstanding." So reads the Federal Constitution. Express power to declare the *State* law nugatory and void could hardly be more plainly vested in the judiciary.

When one turns to examine into the actions and intent of the convention respecting the power of the judiciary over *Acts of Congress* violative of the Constitution, one finds the same unanimity of attitude and purpose. Randolph's eighth resolution was as follows:

"Resolved that the executive and *a convenient number of the national judiciary,* ought to compose a council of revision with authority to examine every act of the national legislature before it shall operate," etc.[10]

This proposal to give to certain judges co-operating with the executive a limited veto on Acts of Congress, came before the convention on several occasions. It was rejected. But what was the very reason given by those who voted against this plan? It was that under the Constitution the judges were to have the power to declare Acts of Congress void for unconstitutionality; that this *judicial veto,* so to speak, made inadvisable the granting of a *quasi executive veto.* The Report of the Convention Proceedings states:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it [the Council of Revision] as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the judges had set aside laws as being against the Constitution. This was done too with general appro-

[9] Farrand, Vol. III, p. 237.
[10] Farrand, Vol. I, p. 21.

bation. It was quite foreign from the nature of ye office to make them judges of the policy of public measures." [11] . . .

"Mr. King was of opinion that the Judicial ought not to join in the negative of a law, because the judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the Constitution." [12]

On July 21st, the proposed limited veto by the national judiciary acting with the executive, again came before the convention, and was again rejected. The Record says:

"Mr. L. Martin considered the association of the judges with the executive as a dangerous innovation; as well as one which could not produce the particular advantage expected from it. A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive in the revision and they will have a double negative." [13] . . .

"Colonel Mason observed that the defence of the executive was not the sole object of the revisionary power. . . . It had been said (by Mr. L. Martin) that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void." [14]

The Federal Convention had proceeded by forming itself into a committee of the whole, and then had adopted after full debate a series of resolutions embodying the principles which should guide them in formulating a Constitution. The resolution of Luther Martin respecting the supremacy of Federal law, has already been quoted. In addition thereto, the following were adopted, looking to the establishment of a Federal judiciary:

"That the government of the United States ought to consist of a supreme legislative, Judiciary and executive."

---

[11] Farrand, Vol. I, p. 97.
[12] Farrand, Vol. I, p. 109.
[13] Farrand, Vol. II, p. 76.
[14] Farrand, Vol. II, p. 78.

"That a national judiciary be established to consist of one supreme tribunal." . . .

"That the jurisdiction of the national judiciary shall extend to cases arising under the laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

"That the national legislature be empowered to appoint inferior tribunals." [15]

On July 26th the Convention adjourned for ten days, having referred the resolutions adopted to a Committee of Detail, whose duty it was to embody the principles of these resolutions into a Constitution, and report. In the draft of the Constitution thus formulated by the committee, the judicial power was only declared to extend to laws of the United States, but on August 27th it was unanimously extended to include "all cases arising under this Constitution."[16] The Report says:

"Doctor Johnson moved to insert the words 'this Constitution and the' before the word 'laws'.

"Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.

"The motion of Dr. Johnson was agreed to, *nem. con.*, it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature."

The reference here is, of course, to the distinguishing characteristic of English and American law, that its judiciary decides only "cases"—controversies between a party plaintiff and a party defendant. Never does a judge say of an Act of Congress: "This is unconstitutional," except where an individual's rights are involved, and then he says so because he must protect the constitutional rights infringed by the act. General declarations by judges, where no case is before the court, are of no binding value whatever. Early in our history the Secretary of State—it was Jefferson himself—wrote to the members of the Supreme Court and suggested their giving opinions to the executive. But they

[15] Farrand, Vol. II, pp. 131-3.

[16] Farrand, Vol. II, p. 430.

declined to "expound the Constitution," except when necessary in performing judicial functions.[17] That power was, however, given to them unanimously—and given by men who had rejected the proposition to grant to them the right to an *executive veto* of an Act of Congress, on the ground that they possessed a *judicial veto*. Can there be a doubt of this unanimous intent? One turns to examine the language employed to embody that intent: "The jurisdiction of the Supreme Court shall extend to all cases arising under this Constitution and the laws passed by the Legislature of the United States." Is that sentence meaningless? Is it ambiguous? To one who reflects at all, is it not clear? With discussions about States rights and Federal powers in the air, what could it mean but one thing? Were the States to decide that an Act of Congress was void? The union would then soon end. Was Congress to decide that its own acts were beyond criticism and supreme? If so, what was the use of the Constitution? Whatever Congress did, was right and unquestionable because, forsooth, they did it. That would be to obliterate all distinction between the legislature and the judicial; to make the legislature judge of its own powers. To men, trained as were the framers of the Constitution in the doctrines of Montesquieu, such a proposition was repellant. They had already rejected the proposition to make the national legislature the judge of the constitutionality of State laws; surely they were not disposed to permit it to become the judge of the constitutionality of its own laws. The language used was undoubtedly employed to give to the Supreme Court, "in cases of a judiciary nature," the right to declare void an Act of Congress for unconstitutionality; it was intended as an express grant of such a power. This is shown by the unanimous interpretation put upon it by its framers in their remarks upon the unwisdom of involving the judiciary in an executive veto. Certainly, a case involving the question whether an Act of Congress has been passed in pursuance of the Constitution, is a case "arising under the Constitution." If the judicial power "extends" to such a case, then to the judicial power is committed the power to declare that the act has not

[17] Jefferson's Works, Vol. IV, p. 22.

been passed in pursuance of the Constitution and is consequently void. The clause in question is, therefore, an express grant of the power unanimously intended to be so granted.

When the Federal Constitution was submitted to the several State conventions for ratification, complete unanimity of interpretation was given to the judiciary clauses. To the proposition, repeated again and again, that the power had been granted to the Federal judiciary to declare void an unconstitutional Act of Congress, no voice was raised in doubt, criticism, or dissent. This power of the judiciary to protect the States and the people from the aggressions of Congress, was the one all-potent argument wielded by the supporters of the Constitution. And, however its detractors may have persisted in their opposition, they united in recognizing the validity of the argument.

In Pennsylvania, James Wilson (a member of the Federal Convention and afterwards a judge of the Supreme Court) quoted the clause: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States"—and said:

"The honorable gentleman from Cumberland (Mr. Whitehill) says that laws may be made inconsistent with the Constitution. . . . If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law." [18]

In Connecticut, Oliver Elsworth (a member of the Federal Convention and afterwards Chief Justice of the Supreme Court) said:

"If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the general government,

[18] Elliott's Debates, Vol. I, p. 489.

the law is void; and upright, independent judges will declare it to be so." [19]

In South Carolina, Charles Pinckney (a member of the Federal Convention) said of the Federal judiciary:

"[Its] duty it would be not only to decide all national questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power." [20]

In North Carolina, William R. Davie (a member of the Federal Convention) quoted the judiciary clause, as did Wilson, and added:

"Every member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to be disregarded or violated. Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened." [21]

Said Governor Johnston:

"Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void." [22]

In Virginia, when in the consideration of the Constitution, the judiciary clauses were reached, a long and animated debate took place. Through it all runs the acceptation of the supreme power intended to be granted the judiciary to set aside Federal and State laws conceived to be unconstitutional. The opposition was directed to the resultant encroachment on *State rights* by the Federal legislative and judicial powers.

Said Madison:

"The first class of cases to which its jurisdiction extends are those which may arise under the Constitution; and this is to extend to equity as well as law. It may be a misfortune that, in organ-

[19] Elliott's Debates, Vol. II, p. 196.
[20] Elliott's Debates, Vol. IV, p. 258.
[21] Elliott's Debates, Vol. IV, p. 156.
[22] Elliott's Debates, Vol. IV, p. 188.

izing any government, the explication of its authority should be left to any of its co-ordinate branches. . . . There is a new policy in submitting it to the judiciary of the United States." [23]

Said Grayson:

"If the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it. They can neither abridge nor extend it." [24]

Said Randolph:

"If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted." [25]

Patrick Henry was the most violent of the opponents in Virginia to the adoption of the Constitution. He objected to the power vested in the Supreme Court to review questions of fact, and thus attacked the attempted answer that Congress had the power to make "exceptions":

"When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void. If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the Federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void." [26]

Henry had raised innumerable objections to the judiciary clauses. To him Marshall replied:

"With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he [Patrick Henry] says that, the laws of the United States being paramount to the laws of the particular States, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the

[23] Elliott's Debates, Vol. III, p. 532.
[24] Elliott's Debates, Vol. III, p. 567.
[25] Elliott's Debates, Vol. III, p. 205.
[26] Elliott's Debates, Vol. III, pp. 540-1.

judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." [27]

This was the John Marshall who, fifteen years later as Chief Justice of the Supreme Court, delivered the opinion in *Marbury* v. *Madison.*

In after years, it was Jefferson and Madison who opposed the Federalists and criticised the constitutional principles enunciated by Marshall and Story. From them, if from any one, must have come dissent from the doctrine of the right in the judiciary to set aside a law for unconstitutionality. Yet it was Madison who in the Federal Convention, in arguing that the Constitution should be ratified by the people and not the State legislatures, said:

"A law violating a Constitution established by the people themselves, would be considered by the judges as null and void." [28]

Again, Madison, when an old man, thus wrote of the power to declare a State law unconstitutional:

"The jurisdiction claimed for the Federal Judiciary is truly the *only* defensive armour of the Federal government, or, rather, for the Constitution and laws of the United States. Strip it of that armour, and the door is wide open for nullification, anarchy and convulsion, unless twenty-four States, independent of the whole and of each other, should exhibit the miracle of a voluntary and unanimous performance of every injunction of the parchment compact." [28a]

Jefferson, also, in a carefully considered letter, written in 1815, thus puts the seal of his approval on the power vested in the courts. He says:

"The second question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character and of crime being ascribed to the judges, through a definite course

[27] Elliott's Debates, Vol. III, p. 553.

[28] Farrand, Vol. II, p. 93.

[28a] Writings of James Madison, Vol. IV, pp. 296-297.

of legal proceeding, laws involving such questions belong, of course, to them; and as they decide on them ultimately and without appeal, they of course decide for themselves." [29]

The truth is that there was a universal consensus of opinion as to the power residing in the Federal judiciary during the early years of this nation's life. The famous Virginia resolutions of 1798 with respect to the alien and sedition laws never assumed to doubt that power. If *unexercised,* the resolutions argued, the several States had the right "to interpose" to limit the operation of an unconstitutional law. Seven States adopted counter resolutions. Two of these are generally antagonistic in language. The remaining States declared as follows:

Rhode Island:

"The second section of the third article of the Constitution of the United States, in these words, to-wit: 'The judicial power shall extend to all cases arising under the laws of the United States,' vests in the Federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States."

Massachusetts:

"The decision of all cases in law and equity, arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States."

New York:

"The judicial power extends expressly to all cases of law and equity arising under the Constitution and the laws of the United States, whereby the interference of the legislatures of the particular States in those cases is manifestly excluded."

New Hampshire:

"That the State legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government, that the duty of such decision is properly and exclusively confided to the judicial department."

---

[29] Jefferson's Works, Vol. VI, pp. 461-2.

Vermont:

"It belongs not to State legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union."

These resolutions of the several States were referred to a committe of the Virginia legislature. The report of this committee was drawn up by Madison. He admits the truth of the principle "that the judicial department is, in all cases submitted to it by the forms of the Constitution, to decide in the last resort . . . in relation to the authorities of the other departments of the Government," although he argues that the States, being parties to what he called "the constitutional compact," could not be irrevocably bound by an unconstituional law.

The assertion, therefore, cannot be gainsaid, that up to the pronouncement of the decision in *Marbury* v. *Madison,* no record exists of speech or writing in which the power is questioned of the Federal judiciary to declare void an unconstitutional Act of Congress. On the contrary, on every side may be found admissions and declarations as to the existence of such a power. How comes it, then, that today the decision in *Marbury* v. *Madison* is so generally asserted to embody not the recognition, but the establishment, of this fundamental constitutional principle? This essay will fail in large measure of its purpose if it does not answer that question.

Marshall was in every way, by experience, association and friendship, familiar with the existing unanimity of conviction on the subject. Therefore, the resistless logic of the opinion in *Marbury* v. *Madison* is directed not only to showing that the result reached is the necessary construction of the language of the Constitution, but also to establish the fact that such result inevitably flows from the nature of a limited Constitution. Marshall had a special reason for giving the broadest possible basis to his conclusions. The case which he was deciding was one of great political significance. The newly-elected President, Thomas Jefferson, had withheld commissions of certain judges nominated and confirmed in the closing hours of the preceding administration, which was politically antagonistic to Jefferson. To that

administration Marshall himself owed his own appointment, and the deepest convictions of his mind were Federalistic as opposed to the Republicanism of Jefferson. Therefore, it is suggested that in enunciating the supremacy of the Constitution, even when for the moment he was forced to decide against his party and his friends, Marshall sought sanction in abstract and general principles of jurisprudence and did not content himself with finding sanction alone in his construction of the words of the Constitution. His logical appeal was, therefore, broad in its character and carried conviction to the great body of the people of the United States.

A close analysis, however, of the opinion shows that Marshall rested his decision upon the express words of the Constitution and recognized that he was but following the previously enunciated doctrine of the court.

"The judicial power of the United States," he said, "is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained."[30]

Marshall further pointed out that as early as 1792 the constitutionality of an Act of Congress had been judicially brought into question, and that the Federal judges had construed the act to be unconstitutional in that it attempted to impose on the judiciary executive functions. The question arose in three circuits and was passed on by Chief Justice Jay and four associates, Cushing, Wilson, Blair and Iredell. All united in the opinion that the act was beyond the constitutional power of Congress, although certain of the judges thought they might, perhaps, sit as commissioners.[31] In referring to this controversy, Marshall states the judicial declaration of unconstitutionality, the repeal of the Act of 1792, and the enactment of the Act of 1793. He then adds that in pursuance of the Act of 1793 a mandamus was

[30] 1 Cranch., p. 178.

[31] See note to Hayburn's Case, 2 Dall. 409 (1792).

subsequently moved for in the Supreme Court to sustain the recognition of rights secured under the Act of 1792, and that it was refused; "the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right."

The case to which Chief Justice Marshall referred is not reported in the books, cannot be found on the docket of the Supreme Court of the United States, and hence its very existence has been doubted. A reference, however, to the Minutes, which are still preserved, shows that the application was made precisely as recited by Marshall, and, after argument, was refused. A copy of the Minutes, taken from the Minutes in Washington, is excerpted in the margin.[32]

Immediately following the refusal to award a mandamus, on February 14, 1794, as above stated, the case of *United States* v. *Yale Todd* [33] was decided by the Supreme Court, February 17, 1794. This case was docketed in the Supreme Court as a case stated, and directly involved the validity of the action of the Federal judiciary, sitting as commissioners under the Federal Act. By a unanimous decision, judgment was entered against the validity of their action, manifestly because of the unconstitutionality of the act involved.[34] Thus is demonstrated the fact

---

[32] Wednesday, 5 Feby. (1794). Present: John Jay, Chief Justice; William Cushing, James Wilson, John Blair, William Paterson, Assistant Justices. Mr. Edmund moved for a mandamus to be directed to the Secretary of War on behalf of John Chandler, a citizen of the State of Connecticut, to cause the said John Chandler to be put on the pension list of the United States as an invalid pensioner conformably to the directions of James Iredell and Richard Law, judges of the Circuit Court of the United States.

The court informed Mr. Edmund that when cause now before court is finished they would hear him in support of his motion.

Friday, 7 Feby. (1794). Present as before. The court proceeded to hear Mr. Edmund on the subject of his motion made on the 5th inst., but postponed the further consideration of the same for the present.

Thurday 13 Feby. (1794). The court proceeded to hear counsel on the motion of Mr. Edmund for a mandamus to the Secretary of War, made on Wednesday, ye 5 inst.

Friday, 14 Feby. (1794). Present as before. The court having taking [sic] into consideration the motion of Mr. Edmund of the 5 inst., and having considered the two Acts of Congress relating to the same, are of opinion that a writ of mandamus cannot issue to the Secretary of War for the purpose assigned in said motion.

[33] Reported in 13 How. 51.

[34] It is of course true that the United States Supreme Court had no original jurisdiction of such an action, but this was not the prevailing opinion at the time.

that in 1794 and not in 1803 was it first decided by the Supreme Court that an Act of Congress not in harmony with the Constitution was inoperative and void, and that it should so be declared by the Federal judiciary.

It is extremely significant to note that so soon as the Act of 1792 [35] was declared unconstitutional, Congress, with Washington as President, hastened to repeal the act, and to pass one directing the Attorney-General to obtain the decision of the Supreme Court upon the effect of any actions taken under the prior act.[36] This is a contemporaneous interpretation by Washington and Congress of the highest importance.

It is difficult for one who attempts an historical survey, to follow the reasoning of those who speak of the power of the Federal judiciary to declare void an Act of Congress for unconstitutionality, as "judge-made law"; and who say of *Marbury* v. *Madison* that in enunciating this principle Marshall developed it as "an implied power." It would seem in any other legal argument a truism to say that when certain language in an instrument is specifically given a certain interpretation, that language is considered to *express* that interpretation. When the power "to regulate commerce" is construed to apply to the thousand and one objects of present-day Federal legislation, is the power less *express?* does it become in any sense *implied?* When the words: "The judicial power shall extend to all cases arising under the Constitution," are construed to mean that the Constitution must by the judiciary in cases coming before them be declared to be paramount to laws passed violative thereof; is not the power declared thereby to be *express?*

There was nothing novel to Marshall's thought, or to the thought of the bar of the United States, in the constitutional principle enunciated by Marshall. He had himself spoken to the same effect in the Virginia debates. He knew and approved of the unanimous action at circuit of the judges in 1792, in recording themselves as of the opinion that an Act of Congress was unconstitutional and of no binding force, and of the subsequent

[35] Act of March 23, 1792, Annals of Congress, Vol. II, pp. 76-8.
[36] Act of February 28, 1793, Annals of Congress, Vol. II, pp. 1436-37.

action of the Supreme Court. And when he wrote the opinion in *Marbury* v. *Madison,* not only did he quote this precedent, not only did he quote the language of the Constitution itself, not only did he strive to show that the interpretation placed upon it was the only possible interpretation, but he endeavored also to establish the fact that the principle recognized by the particular phraseology of the Constitution was essential to all written Constitutions; but it not only *was* an express part of the Constitution adopted, but that it *ought* to have been so made a part. These are the thoughts which underlie the concluding sentence of his opinion in *Marbury* v. *Madison:*

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." [37]

The full appreciation of the true meaning and force of this decision calls for the application of the canons of modern literary criticism. A man's words vary, the message they should convey to us differs, according to what were present to his mind as the assumptions and convictions and attitudes of his audience. Therefore, the important things to grasp are the admitted facts and the assumptions which underlie his decision. Grant, on the one hand, the complete acquiescence in the power of the judiciary in dealing with an unconstitutional act, grant Marshall's knowledge of the examples here gathered together and countless more now lost to us, grant that the power had been enunciated and exercised by the members of the Supreme Court at Circuit, and re-affirmed at the bench of the Supreme Court, grant that the offending act had been at once repealed by Congress with the approval of Washington himself as President—grant all this, and can any be found to wonder that Marshall contented himself on this head with a reference to precedents, and with a declaration that "the particular phraseology of the Constitution of the United States confirms and strengthens the principle"? Turn to consider, on the other hand, the political conditions of the day, recog-

[37] 1 Cranch., p. 780.

nize that Marshall was a Federalist, that the Constitution was the work of Federalists, that that party was out of power and the subject of bitterest criticism, that every word Marshall spoke in rendering the opinion in the case before him would meet with the closest analysis by friend and foe alike—and can any be found to wonder that he added to the statement of what the Constitution said, and of what the court had already declared, a demonstration that the principle he enunciated must necessarily have been included in that Constitution? And so authoritative, so impelling in its logic was the utterance of that great jurist that his words, intended only to state the expressed principle of the Constitution, have come to be regarded in the memory of the American people as *in themselves creating* that principle.

Charles H. Burr.

Philadelphia, Pa.